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Issue Date: 06 April 2005

Case Nos.: 2004-LHC-1494
2004-LHC-1723

OWCP Nos.: 07-160041
07-156351

IN THE MATTER OF

PATRICK O. RILEY,
Claimant

vs.

NORTHROP GRUMMAN SHIP SYSTEMS, INC.,
Employer

APPEARANCES:

SUE ESTHER DULIN, ESQ.
On Behalf of the Claimant

PAUL B. HOWELL, ESQ.
On Behalf of the Employer/Carrier

BEFORE: RICHARD D. MILLS
Administrative Law Judge

DECISION AND ORDER

This proceeding involves a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 et seq., (the "Act" or "LHWCA"). The claim is brought by Patrick O. Riley, "Claimant," against the Northrop Grumman Ship Systems ("Ingalls"), "Employer." Claimant sustained two back injuries during his employment with Northrop Grumman. A hearing was held on October 7, 2004 in Gulfport, Mississippi, at which time the parties were given the opportunity to offer testimony, documentary evidence, and to make oral argument. The following exhibits were received into evidence:

1) Joint Exhibit No. 1;

2) Claimant's Exhibits Nos. 1-31; and

3) Respondent's Exhibits Nos. 1- 44.

Upon conclusion of the hearing, the record remained open for the submission of post-hearing briefs, which were timely received by both parties. This decision is being rendered after giving full consideration to the entire record.[1]

STIPULATIONS[2]

The Court finds sufficient evidence to support the following stipulations:

1) Jurisdiction is not a contested issue. At the time of the alleged injury, the claimant was covered by the U.S. Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901, et seq., since he was engaged in constructing Naval vessels alongside the navigable waters of the Gulf of Mexico in Pascagoula, Mississippi, at Ingalls Shipbuilding, Inc.

2) The dates of injury were November 29, 1999 and February 21, 2001.

3) An employer/employee relationship existed at the time of the accident.

4) Employer was advised of injury on November 29, 1999 and February 21, 2001.

5) A Notice of Controversion was filed on February 5, 2004.

6) Informal Conferences were held on March 23, 2004 and May 11, 2004.

7) Claimant's average weekly wage for the February 21, 2001 injury was $632.98.

8) For the injury of November 29, 1999, Employer paid Claimant at a rate of $225.32 per week from April 25, 2000 to June 25, 2000. For the injury of February 21, 2001, Employer paid Claimant at a rate of $422.00 per week from May 9, 2001 through February 4, 2004.

9) Medical benefits have been paid.

[1] The following abbreviations will be used in citations to the record: JX - Joint Exhibit, CX – Claimant's Exhibit, RX – Employer's Exhibit, and TR – Transcript of the Proceedings.
[2] JX-1.

10) The date of maximum medical improvement for the November 29, 1999 injury was June 5, 2000 as per Dr. Manolakas.

ISSUES

The unresolved issues in these proceedings are:

(1) Nature and Extent of Disability;

(2) Average Weekly Wage;

(3) Failure to provide § 7 Medical Care;

(4) *De Minimus* Award;

(5) Section 8(f) Relief; and

(6) Attorney's Fees, Penalties, and Interest.

SUMMARY OF THE EVIDENCE

I. TESTIMONY

Patrick O. Riley

Patrick Riley is thirty-five years old and has a high school education. TR 31. At the time of his injury he was employed as a joiner/insulator at Ingalls. TR 35. He has been employed with Ingalls since June 23, 1999 and typically worked a 40 hour work week with some overtime. TR 37. He explained that the physical duties of a joiner/insulator included lifting bundles of insulation, bags of mud and buckets of putty weighing about fifty pounds, bending to insulate objects in low and tight places and vertical climbing on ladders and stairs. TR 38-39.

Mr. Riley suffered his first injury on November 29, 1999 when he hit his back on a beam as he was falling six to eight feet from a ladder.[3] TR 40. He experienced pain in his back and legs and reported the injury to Mike Ford. TR 40. His choice of physician was Dr. Hudson, who referred him to Dr. McCloskey. TR 41-42. Mr. Riley initially returned to Ingalls in a light duty capacity pursuant to Dr. McCloskey's restrictions. TR 42. But, on April 25, 2000, Ingalls was no longer able to provide him with work, and he began receiving compensation. TR 44. Dr. McCloskey opined that he did not need

[3] Mr. Riley testified that prior to this injury, he did not have difficulty performing the full duties of his position and that he had no prior back injuries. TR 39.

surgery at the time and sent him to a pain management specialist, Dr. Manolakas. TR 44. After some physical therapy, on June 5, 2000, Dr. Manolakas assigned permanent restrictions of limited bending and maximum lifting of thirty pounds. TR 45. Mr. Riley returned to work on June 6, 2000 and worked under those restrictions. TR 45.

On September 11, 2000, Carrier sent Mr. Riley to Dr. Yearwood for evaluation. TR 45. Mr. Riley testified that Dr. Yearwood told him he would provide treatment, injections, and tests; however, he was never contacted for any further treatment. TR 46. He testified that when he called Dr. Yearwood's office to inquire, he was told that he was discharged for non-compliance because they had tried to call him. TR 46. He received a letter reflecting such on December 21, 2000. TR 47.

Mr. Riley suffered a second injury on February 21, 2001. TR 48. He was working in a modified joiner/insulator position pursuant to Dr. Manolakas' permanent restrictions from his previous injury. TR 48. That day he was assisting Albert Wells by cutting insulation. TR 49. Mr. Riley explained that he walked to bring Albert Wells a piece of insulation, slipped on the wet floor, hit his shoulder on a pipe and fell on his back and buttocks. TR 49. He experienced pain in his lower back, hips, legs, and right shoulder. TR 49. He testified that he reported the accident to Fred Thompson and went to Employer's hospital. TR 49-50.

Mr. Riley again chose Dr. Hudson as his outside orthopedic physician. TR 50; RX-22. Dr. Hudson gave him restrictions and he returned to Ingalls in a light duty capacity. TR 51. Dr. Hudson referred him to Dr. Laseter, and Dr. Laseter and his colleague, Dr. Roberts, provided a facet joint injection and a discogram. TR 50-52. On May 9, 2001, Ingalls no longer had work for Mr. Riley and he began receiving compensation. TR 52; RX-22. Dr. McCloskey performed back surgery in September 2001. TR 52-53. On October 30, 2001, Dr. McCloskey gave Mr. Riley a prescription for a cane. TR 92. Post-surgery, Dr. McCloskey referred Mr. Riley back to Dr. Laseter for pain management. TR 54. When Dr. Laseter moved his practice, Mr. Riley returned to Dr. McCloskey for his pain medications. TR 54. Mr. Riley testified that Dr. McCloskey eventually referred him to Dr. Yearwood for an injection. TR 54. Mr. Riley testified that he contacted his attorney and notified her that he did not want Dr. Yearwood as his pain doctor, but wanted Dr. Chen. TR 55. However, Mr. Riley stated that he continued seeing Dr. Yearwood because he did not want to be perceived as abandoning treatment. TR 55. He saw Dr. Yearwood on April 8, 2003 and June 24, 2003, and received a nerve root block on October 9, 2003. TR 55, 98. Mr. Riley testified that Dr. Yearwood prescribed medication that was not strong enough, and he complained to Dr. McCloskey. TR 97-100. Mr. Riley testified that Dr. Yearwood also ordered an FCE, which was conducted on November 13, 2003. TR 55.

Mr. Riley recalled that at the time of the FCE, he was having pain in his back, hip, groin and emanating down his leg. TR 56. His feet were also numb on occasion. TR 56. Mr. Riley testified that he gave his best effort during the FCE and that no one discussed the results of the FCE with him. TR 57. He followed up with Dr. Yearwood after the FCE, and Dr. Yearwood authorized him to return to work full-duty. TR 57. He testified that Dr. Yearwood did not give him any paperwork nor specify the date that he could begin work. TR 58.

Mr. Riley testified that he presented himself for work on Friday, February 6, 2004. TR 58. He discussed his physical condition with Mike Porter and was told to return Monday for full-duty. TR 61. On Monday, February 9, 2004, he reported to Ingalls. He had a van transport him from the gate to the hospital, then from the hospital to Fred Thompson's worksite.[4] TR 112. Mr. Riley testified that he brought his cane, but when Mr. Thompson told him he could not work with the cane, he returned the cane to his truck. TR 62. Mr. Riley testified that he indicated he was willing to try the job; however, Mr. Thompson decided not to place him on the job. TR 62-63. That day, Dr. McCloskey faxed over work restrictions, and Mr. Riley was sent home. TR 63. He testified that Ingalls offered him no other work. TR 64.

Mr. Riley indicated that Dr. McCloskey ordered another MRI in June 2004. TR 64. He understands that he may need fusion surgery, depending on the results of a discogram. TR 65. He testified that he wanted Dr. Chen or Dr. Laseter to perform the discogram.[5] TR 65-66. He also stated that he would agree to a doctor chosen by the ALJ, but does not want Dr. Yearwood to perform the discogram because he lacks confidence in him. TR 66. Mr. Riley testified that if he is a surgical candidate, he would elect to have the surgery. TR 65.

Mr. Riley testified that he has most recently seen Dr. Darby for pain management. TR 122. He explained that he chose Dr. Darby rather than Dr. Chen because he was one hundred dollars cheaper. TR 123.

Mr. Riley described that he currently has pain in his low back, hips, groin, and emanating down his legs. TR 66. On the left leg the pain extends down his leg to the back of the knee; on the right leg, the pain extends down into the foot and the foot occasionally feels numb. TR 67. He testified that he can sit or stand 10 to 15 minutes before he needs to change position. TR 67. He can walk ten minutes before he needs to rest, and he is comfortable lifting 5 to 10 pounds. TR 67. Bending, twisting, stooping, and climbing stairs intensify his back pain. TR 67. He testified that he lies down on his

[4] Employer provided van transport upon request to all employees, including those without disabilities, due to the distances between work sites and facilities. TR 130.

[5] Dr. Laseter is currently located in Jackson, Mississippi. TR 65-66.

side three to four times a day for pain relief. TR 70. He testified that his pain medications help, but they do not eliminate the pain. TR 70-71. He stated that his medications make him somewhat dizzy and nauseous and he occasionally experiences headaches. TR 72.

Mr. Riley testified that he looked for work within the restrictions given by Dr. McCloskey and that he is willing to try to work. TR 68. On April 14, 2004, he submitted a written application to Top Quality Cleaning Services for a janitorial position. TR 73, 120. He admitted that he showed the employer Dr. McCloskey's restrictions, and the employer informed him that the job exceeded his restrictions. TR 120. On June 17, 2004, he applied with General Insulation. TR 73-74. On June 21, 2004, he applied with Mississippi Security Police. TR 74. On June 23, 2004, he submitted written applications to Hudson's Treasure Hunt and Shell Convenience Store. TR 74-75. On September 20, 2004, he applied for a maintenance position with the City of Moss Point. TR 75. On September 28, 2004, he applied for a cashier position at another Shell Convenience Store. TR 75. On September 28, 2004, he applied at Coastwide Security.[6] TR 76. On October 4, 2004, he applied for cashier positions at a Texaco Convenience Store and Byrd's Music. TR 76-77. On October 5, 2004, he applied at Blockbuster Video Store, and on October 6, he applied at Magnolia Security. TR 77. He has not been offered any job. TR 77. He testified that he intended to continue to look for work within Dr. McCloskey's restrictions. TR 78. He testified that three of the employers inquired about his restrictions. TR 129. He admitted that he took his cane with him when he applied for the jobs, because he needs it when his legs give out on him. TR 106-107. On cross-examination, Mr. Riley explained that after being released from Ingalls on December 30, 2003, he waited four months before looking for work, because he believed he would receive more treatment and did not want to injure himself further by working too soon. TR 104. He testified that he began looking for work when Dr. McCloskey told him he could do light/sedentary work. TR 104.

II. MEDICAL EVIDENCE: Records

A. Injury of November 29, 1999

Dr. Hudson saw Mr. Riley on January 7, 2000. He diagnosed acute lumbar strain and contusion and chronic L5 degenerative disc disease. He issued restrictions of maximum lifting of twenty pounds and no bending or stooping. RX-35, p. 8. He placed Mr. Riley at MMI on March 26, 2000 with a five percent permanent partial impairment to the body as a whole. He issued restrictions of medium duty, maximum fifty pound lifting and no bending or stooping. RX-35, p. 25-26.

[6] Claimant noted that the date of October 28, 2004 on CX-28 was in error. TR 76.

Dr. McCloskey, a neurosurgeon, initially treated Mr. Riley on April 20, 2000 at the referral of Dr. Hudson. CX-11, p. 6. Mr. Riley reported low back and right hip pain with intermittent numbness in the right leg radiating down to the big toe. CX-11, p. 15. Dr. McCloskey found degenerative disc disease at L4 and L5 with disc bulges and an annular tear. CX-11, p. 16. He restricted Mr. Riley to light duty until he could be seen by a physiatrist. CX-11, p. 16.

Dr. Manolakas, a physiatrist, examined Mr. Riley on May 1, 2000. CX-16, p. 3. He prescribed physical therapy and issued restrictions of no lifting above twenty pounds and no climbing above ten feet for ladders and scaffolds. CX-16, p. 3. He placed Mr. Riley at MMI on June 5, 2000 with a five percent permanent partial impairment rating to the body as a whole. CX-16, p. 37. He gave permanent restrictions of no lifting greater thirty pounds and limited bending. CX-16, p. 37.

On September 11, 2000, Dr. Yearwood examined Mr. Riley at Employer's request. He opined that Mr. Riley had intervertebral disc disorder with lumbar radiculitis at L4-5 and L5-S1, some degree of degenerative disc disease at L5-S1, right sacroilitis, and myofascial pain syndrome. He recommended nerve block injections, possible evaluation for surgery and electrical nerve stimulation. He gave Mr. Riley temporary sedentary work restrictions. CX-13, p. 1-3. In correspondence with Carrier dated December 21, 2000, Dr. Yearwood indicated that his office had attempted to contact Mr. Riley on at least six occasions to schedule the approved nerve root injections and the screening procedures necessary for electrothermal therapy. He stated that he had no choice but to consider Mr. Riley at MMI based on his lack of compliance with efforts to provide him with pain therapy. CX-13, p. 18.

B. Injury of February 21, 2001

On March 7, 2001, Dr. Hudson saw Mr. Riley for his February 21, 2001 injury. He diagnosed Mr. Riley with a "right shoulder contusion and chronic lumbar pain secondary to degenerative disc disease with recent exacerbation." Dr. Hudson referred him to a pain management specialist, Dr. Laseter, prescribed Lortab and issued restrictions of maximum lifting of twenty-five pounds, limited bending and stooping, and no overhead work. CX-10, p. 38-39.

Mr. Riley initially saw Dr. Laseter's colleague, Dr. Roberts, for pain management; he recommended pain treatment with injections and medications. CX-14, p. 1. On March 22, 2001, he gave Mr. Riley a temporary restriction of light/sedentary work. CX-14, p. 2. Dr. Roberts administered facet joint injections on March 30, 2001. CX-14, p. 6. On May 8, 2001, he changed Mr. Riley's restrictions to include no prolonged sitting or

standing and that he be allowed to move around periodically during the day. CX-14, p. 18. On May 29, 2001, he referred Mr. Riley to Dr. Laseter for a discography. CX-14, p. 19. Dr. Laseter performed the discography on June 20, 2001, which showed abnormalities at L4-5 and L5-S1. CX-14, p. 21. As a result, he referred Mr. Riley to Dr. McCloskey for surgical evaluation. CX-11, p. 24.

On July 25, 2001, Dr. McCloskey evaluated Mr. Riley. CX-11, p. 25. He recommended back surgery and performed the surgery on September 14, 2001 to address L4-5 and L5-S1 disc herniations. CX-11, p. 61. On October 30, 2001, Dr. McCloskey prescribed a cane for Mr. Riley due to his complaints of low back pain, severe left leg pain, and instability in his right leg. CX-11, p. 80-81. In December 2001, Dr. McCloskey referred Mr. Riley to Ruth Borsage for physical therapy and back to Dr. Laseter for pain management. CX-11, p. 97. Dr. Laseter prescribed Mr. Riley's pain medications and physical therapy through February 1, 2002. CX-14, p. 34.

Dr. McCloskey resumed treating Mr. Riley in August 2002 after Dr. Laseter moved his practice. CX-11, p. 130. Dr. McCloskey began prescribing Mr. Riley's pain medications in lieu of a pain management specialist. CX-11, p. 130. Dr. McCloskey referred Mr. Riley to Dr. Yearwood for an April 8, 2003 appointment. CX-11, p. 152.

Dr. Yearwood evaluated Mr. Riley on April 8, 2003 and opined that he had post laminotomy syndrome, intervertebral disc disruption, lumbar radiculopathy and bilateral sacroiliac joint dysfunction. He recommended epidural steroid injections and functional rehabilitation. CX-13, p. 20. Dr. Yearwood did not assume prescribing Mr. Riley's pain medications, but requested that Dr. McCloskey continue to do so. CX-11, p. 154. Dr. Yearwood again evaluated Mr. Riley on June 24, 2003 and found no new changes. He again recommended the injections, which had not yet been performed. CX-13, p. 21.

Dr. McCloskey continued writing the prescriptions until August 2003, when he arranged for Dr. Yearwood to take over administering the prescriptions. CX-11, p. 160. Dr. McCloskey's records reflect that on September 4, 2003, Mr. Riley contacted his office to tell him that Dr. Yearwood's pain medications were not relieving his pain. CX-11, p. 162. The record notes that Dr. Yearwood had switched him to time-released medications consisting of Tramadol, Zanaflex and other medications. CX-11, p. 164. In response, Dr. McCloskey offered to refer Mr. Riley to another pain management physician. CX-11, p. 162. On September 12, 2003, Mr. Riley asked Dr. McCloskey to refer him to Dr. Chen. CX-11, p. 163. On September 15, 2003, Dr. McCloskey wrote a referral for Sun Coast Pain Management. CX-11, p. 164. However, on September 17, 2003, carrier denied authorization for the referral. CX-11, p. 163.

On September 25, 2003, Mr. Riley inquired at Dr. McCloskey's office about his restrictions and was told that Dr. McCloskey did not give him permanent restrictions and he was to contact Dr. Laseter's office regarding his restrictions. CX-11, p. 171. On

October 6, 2003, Mr. Riley contacted Dr. McCloskey's office because he was having pain; he was told to see Dr. Yearwood. CX-11, p. 171.

Dr. Yearwood performed nerve root injections on October 9, 2003 and ordered an FCE. CX-13, p. 19-25. On November 13 and November 14, 2003, Mr. Riley participated in the FCE, which placed him at the sedentary physical demand level. However, the FCE results noted that he put forth submaximal effort and inconsistent and self-limiting behavior. It noted that the test was not a true representation of his physical ability because he refused to perform a large portion of the test secondary to subjective reports of pain. CX-13, p. 28-29.

On December 18, 2003, Dr. Yearwood responded to inquiries from Carrier, indicating that he felt Mr. Riley was capable of returning to work immediately at medium duty with a transition to full duty. He based his opinion upon the inconsistencies in Mr. Riley's FCE. He also opined that Mr. Riley reached MMI on November 4, 2003. CX-13, p. 26-27. On December 30, 2003, Dr. Yearwood opined that Mr. Riley was at MMI with minimal to no appreciable impairment rating. He recommended that Mr. Riley return to work in a transitional capacity, moving from sedentary to light to medium capacity work. CX-13, p. 40-41.

Mr. Riley's attorney sent Dr. McCloskey a copy of the FCE and a series of inquiries. On February 7, 2004, Dr. McCloskey responded, indicating that he did not agree with the sedentary work restrictions of the FCE, that he believed Mr. Riley to be at MMI, and that he believed Mr. Riley to be limited to sedentary/light work and to suffer from a permanent impairment. However, he also indicated that he had not seen Mr. Riley in the past two years. CX-11, p. 173-175.

Dr. Darby began treating Mr. Riley for pain management on February 19, 2004. He prescribed pain medications, and followed up in March, April and May 2004. On April 9, 2004, he referred Mr. Riley back to Dr. McCloskey for radiculopathy evaluation. CX-19.

On May 13, 2004, Dr. Yearwood responded to a letter from Carrier, opining that it was not medically necessary for Mr. Riley to use a cane. CX-13, p. 42.

Dr. McCloskey reevaluated Mr. Riley on June 24, 2004 at the request of Dr. Darby. CX-11, p. 194, 204. He ordered an MRI, which showed degenerated discs at L4 and L5. CX-11, p. 204. He recommended a one-time reevaluation by Mrs. Borsage, referred him to Dr. Chen for pain management, and prescribed Lortab. CX-11, p. 205, 209. On July 12, 2004, Dr. McCloskey noted that Mrs. Borsage believed that Mr. Riley had strong disc derangements at L4 and L5, and he advised Mr. Riley that if he wished to pursue the problem further Dr. Chen could do a lumbar discogram. CX-11, p. 216. He also prescribed more Lortab. CX-11, p. 217.

In response to inquiries from Mr. Riley's attorney, Dr. McCloskey noted on August 4, 2004 that he restricted Mr. Riley to sedentary/light duty, that he believed Mr. Riley to be at MMI in January 2002, and that he had a ten percent impairment rating to the body as a whole. CX-11, p. 221. He also noted that Mr. Riley needed future pain management and a discogram. CX-11, p. 222.

VOCATIONAL EVIDENCE: Reports

Tommy Sanders

Mr. Sanders, a certified rehabilitation counselor, performed a vocational assessment and labor market survey on June 8, 2004. CX-22, p. 1. In conducting the labor market survey, Mr. Sanders used the restrictions given by Dr. Manolakas and found three suitable employment opportunities. The first job indicated was as a stock clerk at Hudson's Treasure Hunt. The wages were $6.00 per hour and the duties included tagging and organizing shipments of clothing and small home items. The physical requirements were lifting five to fifteen pounds, occasional overhead lifting of five pounds, frequent to constant standing and walking, and occasional bending, stooping, or squatting. CX-22, p. 2. The second job indicated was as an optics polisher at PFG Precision Optics. The wages were $8.00 per hour, and the duties included grinding and polishing lens, prisms, mirrors and windows. It required the ability to work the second shift and to lift five to fifteen pounds with occasional standing and walking and frequent sitting. CX-22, p. 3. The third job indicated was as a night shift unarmed security guard with Mississippi Security Police. The wages were $8.00 per hour, and the physical requirements were lifting five to ten pounds, occasional sitting, frequent standing and walking, and occasional bending and stooping. CX-22, pp. 3.

Mr. Sanders also included that three suitable employment opportunities had been available on November 4, 2003. They were two convenience store cashier positions, at $6.25 and $6.50 per hour, and a security guard position at $7.00 per hour. CX-22, p. 3.

On September 1, 2004, Mr. Sanders performed a follow-up labor market survey based upon Dr. McCloskey's indication that Mr. Riley was capable of only sedentary/light physical activity. CX-22, p.4. Mr. Sanders indicated a convenience store cashier position at Shell, paying $6.00 per hour. In addition to cash register duties, the job also required restocking coolers and shelves for approximately one hour intermittently of an eight hour shift. Physical requirements were lifting twenty pounds occasionally, three to ten pounds frequently, overhead lifting of two to four pounds, occasional sitting, and frequent standing, walking and handling with occasional bending, stooping or squatting. CX-22, p. 4. Mr. Sanders next indicated a night shift security guard position with Public Safety Specialists, paying $6.75 per hour. The job required

alternate sitting, standing and walking with occasional bending. CX-22, p. 5. Mr. Sanders last indicated another night shift security guard position with Coastwide Security, paying $6.00 per hour. The job required alternate sitting, standing and walking with occasional bending. CX-22, p. 5.

Mr. Sanders also analyzed the proposed job duties of the position offered by Ingalls to Mr. Riley on February 6, 2004. Mr. Sanders spoke with Mike Porter and Fred Thompson who told him that they were under the impression that Mr. Riley had been released to normal duty. Both men expressed concern regarding Mr. Riley's suitability based upon his use of a cane and other non-verbal behavior he had exhibited upon presenting himself for work. Mr. Porter explained that he had returned Mr. Riley to the hospital based on safety concerns and potential liability. CX-22, p. 7. Mr. Thompson estimated that an insulator would stand 80 percent of the time and walk 20 percent of the time. The duties required that he twist, stoop, bend, climb and work overhead. CX-22, p. 7. The heaviest item lifted would be 50 pounds very infrequently and 10 to 25 pounds less than one hour per day. Mr. Sanders opined that the proposed position met the definition of medium physical activity. CX-22, p. 8.

III. OTHER EVIDENCE

Claimant's Correspondence with Carrier regarding Medical Care

September 8, 2003: Mr. Riley requested authorization to change from Dr. Yearwood to Dr. Chen for pain management. CX-26, p. 1.

February 25, 2004: Mr. Riley requested authorization to elect Dr. Darby as his choice of physician for pain management. CX-26, p. 2.

June 3, 2004: Mr. Riley advised Carrier of his MRI scheduled for June 11, 2004 and his appointment with Dr. McCloskey scheduled for June 24, 2004. He inquired about authorization for these appointments. CX-26, p. 3.

July 20, 2004: Mr. Riley requested authorization for Dr. Chen to perform the discogram recommended by Dr. McCloskey. CX-26, p. 4.

July 27, 2004 and August 2, 2004: Mr. Riley again requested authorization for Dr. Chen to perform the discogram recommended by Dr. McCloskey. CX-26, p. 5-9.

August 5, 2004: Carrier denied authorization for Dr. Chen, but granted authorization for Dr. Yearwood to perform the discogram. CX-26, p. 10.

August 12, 2004: Mr. Riley responded to Carrier, asserting that Dr. Yearwood was not his choice of physician, but was referred by Carrier. He declined to undergo any treatment or testing by Dr. Yearwood. CX-26, p 11.

August 18, 2004: Mr. Riley advised Carrier that Dr. McCloskey scheduled a discogram with Dr. Chen and again requested authorization. CX-26, p. 13.

August 26, 2004: Carrier again advised Mr. Riley that Dr. Chen was not authorized to perform the discogram. CX-26, p. 14.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The following findings of fact and conclusions of law are based upon the Court's observations of the credibility of the witnesses, and upon an analysis of the medical records, applicable regulations, statutes, case law, and arguments of the parties. As the trier of fact, this Court may accept or reject all or any part of the evidence, including that of expert medical witnesses, and rely on its own judgment to resolve factual disputes and conflicts in the evidence. See Todd Shipyards v. Donovan, 300 F.2d 741 (5th Cir. 1962). In evaluating the evidence and reaching a decision, this Court applies the principle, enunciated in Director, OWCP v. Greenwich Collieries, 114 S.Ct. 2251 (1994), that the burden of persuasion is with the proponent of the rule. The "true doubt" rule, which resolves conflicts in favor of the claimant when the evidence is balanced, will not be applied, because it violates § 556(d) of the Administrative Procedure Act. See Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 281, 114 S.Ct. 2251, 2259, 129 L.Ed. 2d 221 (1994).

JURISDICTION AND COVERAGE

This dispute is before the Court pursuant to 33 U.S.C. §919(d) and 5 U.S.C. §554, by way of 20 C.F.R. §§ 702.331 and 702.332. See Main v. Brady-Hamilton Stevedore Co., 18 BRBS 129, 131 (1986).

In order to demonstrate coverage under the Longshore and Harbor Workers' Compensation Act, a worker must satisfy both a situs and a status test. Herb's Welding, Inc. v. Gray, 470 U.S. 414, 415-16, 105 S.Ct. 1421, 1423, 84 L.Ed. 2d 406 (1985); P.C. Pfeiffer Co. v. Ford, 444 U.S. 69, 73, 100 S.Ct. 328, 332, 62 L.Ed. 2d 225 (1979). The situs test limits the geographic coverage of the LHWCA, while the status test is an occupational concept that focuses on the nature of the worker's activities. Bienvenu v. Texaco, Inc., 164 F.3d 901, 904 (5th Cir. 1999); P.C. Pfeiffer Co., 444 U.S. at 78, 100 S.Ct. at 334-35, 62 L.Ed.2d 225.

The situs test originates from §3(a) of the LHWCA, 33 U.S.C. § 903(a), and the status test originates from §2(3), 33 U.S.C. § 902(3). See P.C. Pfeiffer Co., 444 U.S. at 73-74, 100 S.Ct. at 332, 62 L.Ed. 2d 225. With respect to the situs requirement, § 3(a) states that the LHWCA provides compensation for a worker whose "disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing or building a vessel)." Id. With respect to the status requirement, § 2(3) defines an "employee" as "any person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker . . . ." Id. To be eligible for compensation, a person must be an employee as defined by § 2(3) who sustains an injury on the situs defined by § 3(a). Id.

In this case, the parties do not contest jurisdiction under the Act. Mr. Riley's injuries occurred when he was he was engaged in constructing Naval vessels alongside the navigable waters of the Gulf of Mexico in Pascagoula, Mississippi, at Ingalls Shipbuilding, Inc. JX-1. Therefore, the Court finds that jurisdiction under the Act is proper for this case.

NATURE AND EXTENT OF SCHEDULED DISABILITY

Disability under the Act means, "incapacity as a result of injury to earn wages which the employee was receiving at the time of injury at the same or any other employment." 33 U.S.C. § 902(10). Therefore, in order for a claimant to receive a disability award, he must have an economic loss coupled with a physical or psychological impairment. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Under this standard, an employee will be found to have no loss of wage earning capacity, a total loss, or a partial loss. The burden of proving the nature and extent of disability rests with the claimant. Trask v. Lockheed Shipbuilding Constr. Co., 17 BRBS 56, 59 (1980).

The nature of a disability can be either permanent or temporary. A disability classified as permanent is one that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. SGS Control Servs. v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. Trask, 17 BRBS at 60. Any disability suffered by the claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metro. Area Transit Auth., 16 BRBS 231 (1984); SGS Control Servs., 86 F.3d at 443.

The date of maximum medical improvement is the traditional method of determining whether a disability is permanent or temporary in nature. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235 n.5, (1985); Trask, 17 BRBS at 60; Stevens v. Lockheed Shipbuilding Co., 22 BRBS 155, 157 (1989). The date of maximum medical improvement is the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. This date is primarily a medical determination. Manson v. Bender Welding & Mach. Co., 16 BRBS 307, 309 (1984). It is also a question of fact that is based upon the medical evidence of record, regardless of economic or vocational consideration. Louisiana Ins. Guar. Ass'n. v. Abbott, 40 F.3d 122, 29 BRBS 22 (CRT) (5th Cir. 1994); Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamic Corp., 10 BRBS 915 (1979).

In this case, the parties dispute whether Claimant has yet reached maximum medical improvement ("MMI") for his second injury. Employer asserts that Claimant reached maximum medical improvement for his February 21, 2001 injury on November 4, 2003 as per Dr. Yearwood's opinion, while Claimant asserts that he has not yet reached MMI based on Dr. McCloskey's recommendation for further treatment. Employer counters Claimant's argument by asserting that Dr. McCloskey opined that Claimant was at MMI on February 7, 2004 and August 4, 2004. The Court finds that Claimant has not yet reached MMI.

First, the Court favors Dr. McCloskey's opinion over Dr. Yearwood's opinion as Dr. McCloskey performed Claimant's original back surgery in September 2001 and has followed Claimant's condition since that time. CX-11. In contrast, Dr. Yearwood had only evaluated Claimant on three occasions as of the date he issued his opinion that Claimant had achieved MMI. RX-40.

Second, despite Dr. McCloskey's indications in his February 7, 2004 and August 4, 2004 correspondence with Claimant's attorney that Claimant had reached MMI, Dr. McCloskey is currently treating Claimant with a view towards further medical improvement. Dr. McCloskey recently diagnosed Claimant with suspected disc derangements at L4 and L5 and ordered Claimant to undergo a discogram to determine if further surgery is necessary. CX-11, p. 216, 222. Claimant is awaiting the discogram, subject to this Court's determination of his choice of physician, and has indicated a willingness to pursue the surgery if he is determined to be a surgical candidate. TR 65. Further, Dr. McCloskey's determination of a January 2002 MMI date in his August 4, 2004 correspondence is a retrospective determination of an MMI date, which the Fifth Circuit has found to be an impermissible determination. See Gulf Best Electric v. Methe, 396 F.3d 601, 605 (5th Cir. 2004); La. Ins. Guaranty Assn. v. Abbott, 40 F.3d 122, 126 (5th Cir. 1994). The correct test for determining the date of maximum medical

improvement is the date on which a medical decision is made that further treatment will not improve the patient's condition. See Gulf Best Electric, 396 F.3d at 605. The Court finds that further treatment is anticipated for Claimant and, thus, Claimant has not yet reached MMI.

The extent of disability can be either partial or total. To establish a *prima facie* case of total disability, the claimant must show that he cannot return to his regular or usual employment due to his work related injury. See Manigault v. Stevens Shipping Co., 22 BRBS 332 (1989); Harrison v. Todd Pac. Shipyards Corp., 21 BRBS 339 (1988). Total disability becomes partial on the earliest date that the employer establishes suitable alternative employment. Rinaldi v. General Shipbuilding Co., 25 BRBS 128 (1991). To establish suitable alternative employment, an employer must show the existence of realistically available job opportunities within the geographical area where the employee resides which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. New Orleans Stevedores v. Turner, 661 F.2d 1031 (5th Cir. 1981); McCabe v. Sun Shipbuilding & Dry Dock Co., 602 F.2d 59 (3d Cir. 1979). For the job opportunities to be realistic, however, the employer must establish their precise nature, terms, and availability. Thompson v. Lockheed Shipbuilding & Constr. Co., 21 BRBS 94, 97 (1988). A failure to prove suitable alternative employment results in a finding of total disability. Manigault v. Stevens Shipping Co., 22 BRBS 332 (1989). If the employer meets its burden and shows suitable alternative employment, the burden shifts back to the claimant to prove a diligent search and willingness to work. See Williams v. Halter Marine Serv., 19 BRBS 248 (1987). If the employee does not prove this, then at the most, his disability is partial and not total. See 33 U.S.C. § 908(c); Southern v. Farmers Export Co., 17 BRBS 64 (1985).

Claimant argues that he is capable only of sedentary/light duty work based on Dr. McCloskey's restrictions, while Employer argues that Claimant is capable of medium duty work based on Dr. Yearwood's restrictions. Following his surgery of September 14, 2001, Claimant was followed by Drs. Laseter and McCloskey; however, he was never formally released to return to work nor given any physical restrictions. Claimant was first released to return to work by Dr. Yearwood on December 18, 2003, who released him at medium duty. However, as previously discussed, prior to rendering this opinion Dr. Yearwood had only evaluated Claimant for pain management on three occasions and reviewed the results of an FCE. Dr. McCloskey, Claimant's treating neurosurgeon, subsequently saw Claimant on June 24, 2004 and opined, on August 4, 2004, that Claimant had restrictions of sedentary/light duty work.[7] CX-11, p. 204, 221. The Court places greater weight on Dr. McCloskey's opinion as Claimant's treating neurosurgeon. Regardless of the two year period where Dr. McCloskey had not evaluated Claimant, his

[7] Dr. McCloskey also opined in correspondence dated February 7, 2004 that Claimant was limited to sedentary/light work, but also noted that he had not seen Claimant in two years. Therefore, the Court relies on the August 4, 2004 restrictions because they reflect a well-reasoned medical opinion given after Claimant's June 24, 2004 visit.

June 24, 2004 evaluation combined with his knowledge of Claimant's neurological history justify his restrictions as well-reasoned. Accordingly, the Court finds that Claimant has established a *prima facie* case of total disability, because he cannot return to his usual employment. Claimant's usual employment was the modified joiner/insulator position that he assumed after his first injury, working pursuant to Dr. Manolakas' permanent restrictions of no lifting greater than thirty pounds and limited bending. CX-16, p. 37; TR 48. Mr. Sanders concluded that this position medium duty work. RX-43, p. 6-8. Based on the foregoing, the Court finds that Claimant is now incapable of performing his usual employment pursuant to Dr. McCloskey's restrictions of sedentary/light work.

Employer argues that has rebutted Claimant's *prima facie* case of total disability by producing evidence establishing suitable alternative employment ("SAE"). Employer first argues that it established suitable alternative employment ("SAE") on February 4, 2004 by offering Claimant his former modified position as a joiner/insulator. However, as discussed above, Mr. Sanders opined that this position required medium duty work, which is beyond Claimant's physical capabilities as described by Dr. McCloskey's restrictions of sedentary/light duty work. RX-43, p. 6-8. Therefore, the Court finds that Employer did not establish SAE by offering Claimant the modified joiner/insulator position.

However, Employer also produced a labor market survey dated September 1, 2004 establishing suitable alternative employment ("SAE") based on Dr. McCloskey's August 4, 2004 physical restrictions of sedentary/light duty work.[8] RX-43, p. 4-5. The Court finds that the three job opportunities listed are all suitable to Claimant's age, education, work experience and physical capabilities.[9] The cashier position at Shell paid $6.00 per hour and had physical requirements of lifting 20 pounds occasionally, three to ten pounds frequently, overhead lifting of two to four pounds, occasional sitting, frequent standing, walking and handling with occasional bending, stooping or squatting. RX-43, p. 4. The next two positions were night shift security guard positions with Public Safety Specialists and Coastwide Security, paying $6.75 and $6.00 per hour, respectively. RX-43, p. 5. Both jobs required alternate sitting, standing and walking with occasional bending. RX-43, p. 5. The Court finds that the physical requirements of each job fit within the definition of sedentary/light duty work because they do not require lifting greater than twenty pounds and do not require frequent to constant standing or walking.

[8] Employer additionally submitted a labor market survey dated June 8, 2004. RX-43, p. 1-3. However as of this date, Claimant had not been issued restrictions by Dr. McCloskey.

[9] Notably, Claimant admitted in his brief that Employer demonstrated suitable alternative employment and that he was entitled only to partial disability. See Memorandum Brief of Claimant, Patrick O. Riley, dated December 17, 2004, p. 28-29. However, the Court will conduct the analysis for the sake of clarity.

The Court next finds that Claimant has not met his burden of proving a diligent search and a willingness to work.[10] Claimant testified that he is willing to try to work; however, his job search was inadequate. TR 68. On September 20, 2004, Claimant applied for a maintenance position with the Moss Point Recreation Department, but was denied because the physical demand exceeded his restrictions. CX-28, p. 2. He testified, and his job search records reflect, that he submitted written applications for the cashier position at Shell and the security guard position at Coastwide Security on September 28, 2004. TR 75-76; CX-28, p. 1, 8. On October 4, 2004, he submitted an application for a cashier position at Texaco and inquired at Byrd's Music, which was not hiring. TR 76-77; CX-28, p. 8. On October 5, 2004, he inquired at Blockbuster Video, and on October 6, 2004, he inquired at Magnolia Security, neither of which were hiring. TR 77; CX-28, p. 8. Claimant also admitted that he took his cane with him when he applied for the jobs and showed Dr. McCloskey's limitations when applying for several of the jobs. TR 106-109. After reviewing Claimant's job search efforts in the time period after Employer established SAE, the Court finds that Claimant has not been diligent in his search. He did not apply for any jobs from September 1, 2004 through September 20, 2004. The maintenance position for which he applied on September 20, 2004 was well beyond his sedentary/light duty capabilities. On September 28, 2004, Claimant applied for two of the three suitable positions listed in the labor market survey, but did not apply for the security guard position at Public Safety Specialists. His only other attempt at a job search took place in the three days preceding the hearing. The Court is further concerned that Claimant's use of his cane when applying for positions may have hindered his success. Based on Claimant's lack of consistency in his job search and his failure to apply for the Public Safety Specialists position listed in the labor market survey, the Court finds that as of September 1, 2004, Claimant was not diligent in his job search efforts.

Because Employer established suitable alternative employment on September 1, 2004, and Claimant failed to meet the burden of proving a diligent search and willingness to work at that time, the Court finds that Claimant's entitlement to total disability benefits ceased on September 1, 2004 and Claimant is entitled only to partial disability. The Court finds that Mr. Richmond's partial disability is a § 8(c)(21) unscheduled injury, based on Dr. McCloskey's diagnosis of a back injury causing permanent partial impairment of ten percent to the whole body. See CX-11, p. 221; 33 U.S.C. § 908(c)(21).

The parties have stipulated that for his February 21, 2001 injury, Claimant was paid temporary total disability benefits from May 9, 2001 through February 4, 2004. JX-1. Based on the findings of the Court discussed above, Claimant is additionally entitled to temporary total disability from February 5, 2004 through August 31, 2004 and to temporary partial disability from September 1, 2004 through the present.

[10] Notably, Claimant did not argue in his brief that he conducted a diligent search in an effort to rebut Employer's showing of suitable alternative employment. However, Claimant did testify to such effect at the formal hearing. See generally, Memorandum Brief of Claimant, Patrick O. Riley, dated December 17, 2004.

WAGE-EARNING CAPACITY

The following discussion of Claimant's wage-earning capacity is applicable only to the time period from September 1, 2004 through the present, in relation to Claimant's second injury of February 21, 2001.

The determination of post-injury wage-earning capacity in cases of permanent partial disability is governed by §§ 8(c) and 8(h) of the Act, 33 U.S.C. §§ 908(c) and 908(h). La Faille v. Benefits Review BD., 884 F.2d 54, 60, 22 BRBS 108, 118 (CRT)(2nd Cir. 1989). Because Claimant's injury is not of a kind specifically identified in the schedule set forth in §§ 8(c)(1)-(20), it falls under § 8(c)(21). 33 U.S.C. §§ 908(c)(1)-(21). Under § 8(c)(21), compensation is set at 66 2/3 percent of the difference between claimant's average weekly wages at the time of the injury and his post-injury wage-earning capacity, as determined pursuant to § 8(h) of the Act. Bethard v. Sun Shipbuilding & Dry Dock Co., 12 BRBS 691, 693 (1980); 33 U.S.C. § 908(c)(21).

Section 8(h) provides in part that post-injury wage-earning capacity shall be determined by claimant's actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity. Bethard, 12 BRBS at 693; 33 U.S.C. § 908(h). However, if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the Court may, in the interest of justice, fix such wage earning capacity as shall be reasonable, having due regard to the nature of the employee's injury, the degree of physical impairment, the employee's usual employment, and any other factors or circumstances which may affect the employee's capacity to earn wages in a disabled condition, including the effect of disability as it may naturally extend into the future. 33 U.S.C. § 908(h). Furthermore, §§ 8(c)21 and 8(h) of the Act require that the wages earned in a post injury job be adjusted to account for inflation in order to represent the wages that job paid at the time of the claimant's injury, insuring that wage-earning capacity is considered on an equal footing with the determination under § 10 of average weekly wage at the time of the injury. Richardson v. General Dynamics Corp., 19 BRBS 48, 49-50 (1986); Bethard, 12 BRBS at 695; La Faille, 884 F.2d at 61, 22 BRBS at 120. The Benefits Review Board has held that the percentage increase in the National Average Weekly Wage ("NAWW") for each year should be used to adjust a claimant's post-injury wages for inflation. Richardson v. General Dynamics Corp., 23 BRBS 327, 330-31 (1990). In addition, a court may average the hourly wages of jobs found to be suitable alternative employment in order to calculate wage-earning capacity. Avondale Industries v. Pulliam, 137 F.3d 326, 328, 32 BRBS 65, 67 (5th Cir. 1998).

In the present case, Employer showed three suitable employment opportunities for Claimant. The full-time Shell cashier position paid $6.00 per hour, the full-time security guard positions paid $6.00 and $6.75 per hour, respectively. These jobs paid an average wage of $6.25 per hour, equating to a weekly wage of $250.00. This September 2004

weekly wage must be adjusted downward to account for inflation since the time of Claimant's work-related injury. The NAWW for September 2004 is $515.39, and the NAWW for February 2001 is $466.91. United States Dept. of Labor, Employment Standards Administration (April 1, 2004). Adjusting the September 2004 average weekly wage of $250.00 in consideration of the February 2001 NAWW, the Court finds that the proper wage-earning capacity for Claimant in February 2001 with respect to these positions is $226.48 per week.[11] Therefore, the Court finds that the proper wage-earning capacity for Claimant in February 2001 wages is $226.48 per week.

AVERAGE WEEKLY WAGE

The parties dispute Claimant's average weekly wage at the time of his first injury only. Therefore, the Court's discussion of average weekly wage pertains only to compensation due as a result of the November 29, 1999 injury. The parties' stipulation of an average weekly wage of $632.98 for the second injury is accepted by the Court.

Section 10 of the Act, 33 U.S.C. § 10, sets forth three alternative methods for determining a claimant's average annual earnings, which are then divided by 52 pursuant to Section 10(d) in order to arrive at an average weekly wage. See Johnson v. Newport News Shipbuilding and Dry Dock Co., 25 BRBS 340 (1992). The determination of an employee's annual earnings must be based on substantial evidence. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 104 (1991).

Section 10(a) applies when an employee has worked in similar employment for substantially the whole of the year. See 33 U.S.C. § 910(a). The §10(a) formula requires the finding of an average daily wage and can only be utilized if the record contains evidence from which an average daily wage can be determined. Taylor v. Smith & Kelly Co., 14 BRBS 489, 494-95 (1981); Todd Shipyards Corp. v. Director, OWCP, 545 F.2d 1176, 1179, 5 BRBS 23, 26 (9th Cir. 1976).

The Court finds that §10(a) does not apply because Claimant did not work for Employer for substantially the whole of the year preceding the injury and has not provided evidence of wages earned at similar employment during the preceding period. Claimant began working for Employer on June 23, 1999 and was injured on November 29, 1999, a period of 23 weeks or five months. TR 37; CX-6. The Court finds that five months is not substantially the whole of the year. See Anderson v. Todd Shipyards, 13 BRBS 593, 596 (1981) (finding that twenty-eight weeks of employment constitute substantially the whole of the year for purposes of §910(a)). Therefore, the Court finds that §10(a) is inapplicable to this case.

[11] The Court arrived at these figures by calculating the proportion: *x*/ $466.91 = $250.00/$515.39.

Because Section 10(a) is not applicable, the Court will look to §10(b). Section 10(b) calculates the average weekly wage based on similarly situated employees and applies when the injured employee did not work for substantially the whole of the year under §10(a). See 33 U.S.C. § 910(b). Because no evidence was presented concerning the wages of a similarly situated employee, the Court finds that §10(b) is also inapplicable to this case.

When both Sections 10(a) and (b) are inapplicable, the calculation of average weekly wage defaults to §10(c), which allows the Court to calculate a claimant's average weekly wage in a manner that reflects a fair and reasonable approximation of the claimant's annual wage earning capacity at the time of his work injury. See 33 U.S.C. § 910(c). Both parties submit wage records showing that Claimant earned $13,457.44 during the 23 week period from June 23, 1999 to November 29, 1999. RX-6; CX-7. Dividing $13,457.44 by 23 weeks, yields a weekly wage of $585.11. To calculate Claimant's annual wage earning capacity, the Court multiplies $585.11 by 52 weeks, to yield an annual wage earning capacity of $30,425.72. Pursuant to §10(d), the average weekly wage is calculated by dividing $30,425.72 by 52 weeks, yielding an average weekly wage of $585.11. The Court finds that this figure fairly represents a calculation of Mr. Riley's average weekly wage at the time of his work injury and is acceptable under §10(c), a section under which the Court has wide discretion.

CHOICE OF PHYSICIAN

Under the Act, a claimant has the right to choose an attending physician who is authorized by the Secretary to provide required medical care. 33 U.S.C. § 907(b). After a claimant has made his initial, free choice of attending physician, he may not thereafter change physicians without the prior written consent of the employer or carrier or the district director. 20 C.F.R. § 702.406(a). The regulation also provides that "such consent *shall* be given in cases where an employee's initial choice was not of a specialist whose services are necessary for, and appropriate to, the proper care and treatment of the compensable injury or disease. In all other cases, consent *may* be given upon a showing of good cause for change." 20 C.F.R. § 702.406(a) (emphasis added). When a claimant is referred by his initial physician to a specialist whose services are necessary for the proper care and treatment of his injury, the initial physician is providing the care of the specialist. See Senegal v. Strachan Shipping Co., 21 BRBS 8 (1988); Armfield v. Shell Offshore, Inc., 25 BRBS 303 (1992). Accordingly, the claimant is not required to seek prior authorization for such treatment, and the employer is not required to consent to a change of physician for the specialist. Id.

The parties dispute Claimant's choice of physician for pain management treatment and the proper physician to perform the diagnostic discogram requested by Dr. McCloskey. Employer contends that Dr. Yearwood is Claimant's choice of physician because he was referred by Dr. McCloskey, Claimant's authorized treating neurosurgeon. Claimant asserts that Dr. Yearwood is Employer's physician and that his choice of physician is Dr. Chen, to whom Dr. McCloskey also wrote a referral.

The Court finds that Dr. Yearwood is Claimant's choice of physician and, pursuant to 20 C.F.R. § 702.406(a), Employer is not required to consent to a change of physician for Claimant's pain management treatment. First, the Court rejects Claimant's argument that because Dr. Yearwood was Employer's physician from the first injury, he cannot now be Claimant's choice of physician. Claimant cites no authority for this proposition, and the Court finds that Claimant's treatment for his prior injury has no bearing on his authorized physician's referrals for his second injury. Further, Claimant consented to treatment by Dr. Yearwood on two occasions before requesting pain management treatment from Dr. Chen. CX-13, p. 20-21; CX-26, p. 1. Second, it is undisputed that Claimant exercised his initial, free choice of physician for his second injury when he selected Dr. Hudson as his attending orthopedic physician. It therefore follows that Employer need not consent to any change in physician for referrals resulting from Dr. Hudson, because Dr. Hudson is considered to be providing the care of the specialist to whom he makes the referral. See Senegal, 21 BRBS 8. In this case, Dr. Hudson referred Claimant to Dr. Laseter for pain management. Dr. Laseter referred Claimant to Dr. McCloskey for neurosurgery, and Dr. McCloskey referred Claimant back to Dr. Laseter for pain management. When Dr. Laseter moved his practice, Claimant returned to Dr. McCloskey for pain medication prescriptions. Dr. McCloskey then referred Claimant to Dr. Yearwood for pain management. CX-11, p. 130. The referral to Dr. Yearwood resulted from a chain of referrals originating with Dr. Hudson, Claimant's initial free choice of physician. Therefore, the Court finds that Dr. Yearwood is necessarily Claimant's choice of physician. Consequently, Employer is not required to authorize a change of physician, even in light of Dr. McCloskey's subsequent referral to Dr. Chen for pain management.

Claimant also asserts that he need not obtain authorization for a change of physician because Dr. Yearwood has effectively refused him medical treatment by placing him at maximum medical improvement with no permanent impairment. The Court finds that Claimant has not produced substantial evidence establishing that Dr. Yearwood refused to provide further medical treatment. Dr. Yearwood's medical records establish that after administering a nerve root block injection and analyzing Claimant's FCE, he altered Claimant's pain medications from Lortab and Soma to a sustained-release medication containing dextromethorphan and hydrocodone. RX-40, p. 12-29. He additionally opined on December 18, 2003 that Claimant had reached MMI and was capable of immediate return to work in a transitional capacity to his usual employment.

RX-40, p. 27. The Court does not find evidence in the record that Dr. Yearwood at any point denied Claimant medical treatment. His alteration of Claimant's pain medications reflects a change in methodology of pain treatment; however, Claimant has not shown such a change to be medically unacceptable. See Slattery Assoc., Inc. v. Lloyd, 725 F.2d 780, 784 (D.C. Cir. 1984). Therefore, the Court finds that Dr. Yearwood has not refused Claimant further medical treatment.[12]

In accordance with the Court's finding that Dr. Yearwood is Claimant's choice of physician, the Court also finds that Dr. Yearwood is the suitable physician to perform the discogram recommended by Dr. McCloskey. Claimant has failed to demonstrate to the Court that Dr. Yearwood is not a fair and impartial physician or that he lacks the qualifications necessary to administer the discogram. As such, the Court has no authority to compel Employer to authorize a change of physician to enable Dr. Chen to perform the discogram. Neither can the Court force Employer to authorize Dr. Laseter to perform the discogram, as Claimant was effectively discharged from Dr. Laseter's care when he moved his practice to Jackson, Mississippi.

REASONABLE AND NECESSARY MEDICAL EXPENSES

Section 7(a) of the Act provides that:

> (a) The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process or recovery may require. 33 U.S.C. § 907(a).

In order for a medical expense to be assessed against the employer, the expense must be both reasonable and necessary. Parnell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care must be appropriate for the injury. 20 C.F.R. § 702.402. A claimant has established a prima facie case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-258 (1984). The claimant must establish that the medical expenses are related to the compensable injury. See Pardee v. Army & Air Force Exch. Serv., 13 BRBS 1130 (1981); See Suppa v. Lehigh Valley R.R. Co., 13 BRBS 374 (1981). The employer is liable for all medical expenses which are the natural and unavoidable result of the work injury, and not due to an intervening cause. See Atlantic Marine v. Bruce, 661 F.2d 898, 14 BRBS 63 (5th Cir. 1981), aff'g 12 BRBS 65 (1980).

[12] For the sake of clarity, the Court notes that its decision to credit Dr. McCloskey's opinion regarding Claimant's MMI date and physical restrictions over Dr. Yearwood's opinion does not discredit Dr. Yearwood's methodology of medical treatment nor amount to a finding that Dr. Yearwood has denied Claimant further treatment.

The Court finds that Employer is liable for all past and future compensable medical benefits arising from Claimant's November 29, 1999 and February 21, 2001 injuries, including the discogram and any of Claimant's authorized physician's resulting recommendations.

SECTION 8(F) SPECIAL FUND RELIEF

Section 8(f) shifts part of the liability to pay compensation for permanent disability or death from an employer to the Special Fund established in § 44 of the Act when the disability or death is not due solely to the injury that is the subject of the claim. See Wiggins v. Newport News Shipbuilding & Dry Dock Co., 31 BRBS 142, 146 (1997); 33 U.S.C. § 908 (f) and § 944.

The Court finds that Employer is not entitled to Section 8(f) relief at this time because Claimant has not reached yet reached MMI from his second injury, rendering him temporarily partially disabled. Due to the temporary nature of Claimant's second injury at this time, Employer is precluded from obtaining Section 8(f) Special Fund relief.

DE MINIMUS AWARD

When an employee has proven a medical disability which presently causes no loss in wage-earning capacity, but has a reasonable expectation that a loss of wage-earning capacity will occur in the future, a *de minimus* award is appropriate. Metropolitan Stevedore Co. v. Rambo [Rambo II], 521 U.S. 121 (1997); Randall v. Comfort Control, Inc., 725 F.2d 791, 800, 16 BRBS 56, 69-70 (CRT)(D.C. Cir. 1984), vacating 15 BRBS 233 (1983); Hole v. Miami Shipyards Corp., 640 F.2d 769, 773, 13 BRBS 237, 240 (5th Cir. 1981), rev'g 12 BRBS 38 (1980).

In this case, Claimant asserts that he was entitled to a *de minimus* award while working modified duty for Employer from June 6, 2000 through February 21, 2001, the date of his second injury. The Court finds that Claimant is not entitled to a *de minimus* award. There is no evidence in the record upon which to formulate a reasonable expectation that Claimant will suffer a future loss in wage-earning capacity as a result of his first injury. Further, Claimant currently suffers a loss of wage-earning capacity as a result of his second injury, which affects the same area of Claimant's back, the L4 and L5 discs. Accordingly, the Court finds no basis upon which to grant a *de minimus* award.

ATTORNEY'S FEES

Under Section 28(b) of the Act, when an employer voluntarily pays benefits and thereafter a controversy arises over additional compensation due, the employer will be liable for an attorney's fee if the claimant succeeds in obtaining greater compensation than that paid by the employer. See 33 U.S.C. § 928(b); Moody v. Ingalls Shipbuilding, Inc., 27 BRBS 173, 176 (1993).

In this case, Employer voluntarily paid Claimant disability benefits for the injury of November 29, 1999 from April 25, 2000 to June 25, 2000, a rate of $225.32 per week, and for the injury of February 21, 2001 from May 9, 2001 through February 4, 2004, at a rate of $422.00 per week. JX-1. This Court has found that Claimant's average weekly wage at the time of his first injury was $585.11, resulting in a compensation rate of $390.07 per week, which is greater than the rate paid by Employer. This Court has also awarded Claimant temporary total disability benefits from the second injury from May 9, 2001 through August 31, 2004 and temporary partial disability benefits from September 1, 2004 through the present, which exceeds the date upon which Employer ceased payments for Claimant's second injury. Based on the Court's award of greater compensation than the compensation paid by Employer, the Court finds that Claimant is entitled to attorney's fees from Employer.

Accordingly,

ORDER

It is hereby **ORDERED, ADJUDGED AND DECREED** that:

The compensation rate for Claimant's November 29, 1999 injury shall be based on an average weekly wage of $585.11.

1) Employer/Carrier shall pay to Claimant, for his February 21, 2001 injury, temporary total disability benefits from May 9, 2001 through August 31, 2004, based on an average weekly wage of $632.98. Employer/Carrier shall pay to Claimant temporary partial disability from September 1, 2004 through the present, based on an average weekly wage of $632.98 to be reduced by a residual wage-earning capacity of $226.48.

2) Employer/Carrier shall be entitled to a credit for all payments of compensation previously made to Claimant.

3) Employer/Carrier shall pay to Claimant interest on any unpaid compensation benefits. The rate shall be calculated as of the date of this Order at the rate provided by 28 U.S.C. Section 1961.

4) Dr. Yearwood is Claimant's choice of physician, and Employer/Carrier is not required to authorize a change of physician.

5) Employer/Carrier shall pay Claimant for all reasonable and necessary future medical expenses that are the result of Claimant's November 29, 1999 and February 21, 2001 injuries, including the discogram and any of Claimant's authorized physician's resulting recommendations.

6) Claimant's counsel shall have thirty (30) days from receipt of this Order in which to file a fully supported attorney fee petition and simultaneously to serve a copy on opposing counsel. Thereafter, Employer shall have thirty (30) days from receipt of the fee petition in which to file a response.

7) All calculations necessary for the payment of this award are to be made by the OWCP District Director.

So ORDERED.

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RICHARD D. MILLS
Administrative Law Judge